SUPREME COURT, U.S.
FILED
SEP 3 - 2004
OFFICE OF THE CLERK

No. 03-1709

IN THE

Supreme Court of the United States

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

MELVIN C. GARBOW
HOWARD N. CAYNE
JONATHAN S. MARTEL
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

KENT L. JONES
Counsel of Record
TERESA WYNN ROSEBOROUGH
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases Page

Billings v. United States, 232 U.S. 261 (1914) 3
Bromley v. McCaughn, 280 U.S. 124 (1929) 5, 7, 9
Eisner v. Macomber, 252 U.S. 189 (1920) 2, 3, 4, 9
Fernandez v. Wiener, 326 U.S. 340 (1945) 3, 5, 9
Helvering v. Independent Life Ins. Co., 292 U.S. 371 (1934) . 2
Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) 4, 5
Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895) ..... *passim*
Richardson v. United States, 294 F.2d 593 (6th Cir. 1961) 3
United States v. Manufacturers National Bank, 363 U.S. 194 (1960) 5, 9
Yankee Atomic Electric Co. v. United States, 112 F.3d 1569 (Fed Cir. 1997), cert. denied, 524 U.S. 951 (1998) 7

Federal Constitution, Legislation and Statutes:

Constitution of the United States

Article I, section 2, clause 3 ..... *passim*
Article I, section 9, clause 4 ..... *passim*
Amendment XVI 3

42 U.S.C. § 2297g-1(c) 6
42 U.S.C. § 2297g-1(c)(1) 6
42 U.S.C. § 2297g-1(c)(2) 6

Miscellaneous:

Hearings Before the House Committee on Ways and Means on the Comprehensive National Energy Policy Act, 102d Cong., 2d Sess. (April 28, 1992) (Serial 102-94) 6

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-1709

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The government acknowledges that the court below has adopted an interpretation of the "direct tax" clauses that conflicts with numerous decisions of this Court and of other courts of appeals. The government erroneously asserts, however, that those numerous prior decisions reflect only "dicta" that the court below was free to ignore. Br. In Opp. 13, 16. The government further errs in contending that the tax at issue in this case is not imposed on the "ownership" of property but is, instead, an excise imposed on "the prior receipt of benefits" from enriched uranium. Br. In Opp. 9. That contention is flatly inconsistent with the clear text of the statute, and it was not adopted or relied on by the court below.

Because the decision of the court of appeals conflicts with the decisions of this Court and other courts of appeals and, in doing so, broadly sanctions the imposition of unconstitutional federal property taxes that have an enormous fiscal effect, review of the unprecedented Federal Circuit decision in this case is warranted.

1. a. Although the court below acknowledged that a "general" federal property tax is proscribed by the "direct tax" clauses of the Constitution (U.S. Const. Art. I, § 2, cl. 3; U.S. Const. Art. I, § 9, cl. 4), the court nonetheless held that a federal tax imposed on the ownership of "only one particular kind of personal property" is *not* proscribed by the Constitution. Pet. App. 18a, 19a. For the reasons detailed in the petition, that strained conclusion cannot be reconciled with the broad and express restriction on direct federal taxation of property that is set forth *twice* in the Constitution. See Pet. 11-17. Moreover, the government now candidly acknowledges that, in numerous cases following *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), this Court and several courts of appeals have concluded that a federal tax imposed on the "ownership" of "specific personal property" (Br. In Opp. 16) violates the "direct tax" clauses of the Constitution. Without analyzing these cases in any detail, however, the government casually asserts that they represent nothing more than "dicta" that need not be followed. Br. In Opp. 13, 16. The government's unexamined description of this precedent is plainly incorrect.

In numerous contexts, this Court and the courts of appeals have consistently interpreted the proscriptions of the "direct tax" clauses to forbid the imposition of not only general property taxes but also of taxes on "one particular kind of personal property" or another. See Pet. 17-22 (citing cases). For example, in *Eisner* v. *Macomber*, 252 U.S. 189, 219 (1920), *Helvering* v. *Independent Life Ins. Co.*, 292 U.S. 371,

378-379 (1934), and *Billings* v. *United States*, 232 U.S. 261, 279 (1914), this Court applied the "direct tax" clauses to conclude that Congress could not impose a federal tax on the ownership of such discrete types of property as stock dividends (*Eisner*), the value of the owner-occupied part of a building (*Independent Life Ins. Co.*), and a yacht (*Billings*).[1] See also cases cited Pet. 14-17. Prior to the decision in this case, the government had also routinely "conceded" that it would be a violation of the "direct tax" clauses to impose "a tax on principal" amounts of promissory notes because a direct tax on such items of personal property would be invalid under "well settled principles." *Richardson* v. *United States*, 294 F.2d 593, 596 (6th Cir. 1961).

The court below failed to address or even acknowledge these numerous conflicting decisions. And, the only one of these decisions that is addressed in the government's brief is *Eisner* v. *Macomber*, *supra*, which the government incorrectly attempts to characterize (in a footnote) as a case that does little more than interpret the meaning of the term "income" in the Sixteenth Amendment. Br. In Opp. 16 n.8. In fact, however, in *Eisner*, this Court clearly and expressly held that a tax imposed on the value of a specific, particular kind of property (a stock dividend) is unconstitutional under the "direct tax" clauses and thus "contravenes the provisions of Article I, § 2, cl. 3, and Article I, § 9, cl. 4, of the Constitution." 252 U.S. at 534.[2]

---

[1] In *Billings*, the government did not dispute that a tax on the mere ownership of property "would probably" be an impermissible direct tax; instead, the government argued that an excise tax "levied upon the use" of such property is permissible because it "is indirect in the constitutional sense." 232 U.S. at 271. See *Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945); Pet. 15.

[2] In *Eisner*, the Court first addressed whether the value of the stock dividend represented "income" because, if the tax were on

The government attempts to distinguish that plain holding of *Eisner* from the present case on the theory that the tax involved in *Eisner* "was not imposed on specific personal property owned by the taxpayer." Br. In Opp. 16 n.8. The government makes the untenable suggestion that a tax on a stock dividend should not be regarded as a tax on a "particular kind of personal property" because the dividend share of stock "represented an undifferentiated share of the total assets of the corporation." *Ibid.* The government's strained effort to distinguish the personal property involved in *Eisner* from the personal property involved in this case is manifestly illogical. A tax on the value of a share of stock is unquestionably a tax imposed on a "particular kind of personal property" within the ordinary meaning of those words, for such a limited exaction would plainly not be "a general tax on broad classes of personal property." Pet. App. 18a.

In rejecting the large body of precedent that has consistently interpreted and applied the "direct tax" clauses to proscribe federal taxes imposed both generally on all property and also on the ownership of "particular kinds" of property, the decision of the court below seeks to return to the view urged by Alexander Hamilton in the early case of *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796). See Pet. App. 12a. In *Pollock*, *Eisner* and subsequent decisions, however, this

---

"income," it would have been permitted by the Sixteenth Amendment notwithstanding the "direct tax" clauses. See Pet. 14 n.11. The Court concluded in *Eisner* that the value of the stock dividend did not represent income and therefore reached the question whether the tax imposed on the value of that property was impermissible under the "direct tax" clauses. See 252 U.S. at 533-534. The holding under the "direct tax" clauses in *Eisner* has never been questioned by this Court or, prior to the decision in this case, by any other court.

Court clearly rejected the broad reading of *Hylton* that the court below has adopted. See Pet. 18-19. This Court has made clear that the decision in *Hylton* does *not* apply to cases that involve taxes on the ownership of property, and instead stands only for the proposition that "a tax imposed upon a particular *use* of property * * * is an excise which need not be apportioned." *Bromley* v. *McCaughn*, 280 U.S. 124, 136 (1929). See Pet. 14 n. 10 (citing cases); *id.* at 18-19. In the present case, the court of appeals failed to address the decisions that expressly reject the broad reading of *Hylton* now urged by the government. By doing so, the court failed to honor the decisions of this Court that clearly hold that a tax on property that "falls upon the owner merely because he is owner" is proscribed by the "direct tax" clauses of the Constitution. *Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945). See *United States* v. *Manufacturers National Bank*, 363 U.S. 194, 197-198 (1960).

b. The government does not dispute that the "direct tax" clauses were placed in the Constitution to protect the inherent, traditional authority of the States over direct taxation of persons and property and to restrict the federal government from such taxation to ensure that it is not "exercised unfairly and discriminatingly, as to particular States or otherwise." *Pollock*, 158 U.S. at 620. See Pet. 19-20, 25-26. The holding of the court of appeals in this case directly conflicts with this settled understanding of the object and purpose of the "direct tax" clauses.

The court below held that the federal government is free to tax any "particular type" of property without infringing this constitutional prohibition. Pet. App. 19a. A tax on any "particular kind" of property, however, quite obviously may burden some States more severely than others. For example, a tax on stock dividends, corporate bonds or pineapples would plainly have disparate regional effects. Indeed, the EPACT

assessment was opposed in the House of Representatives precisely on these grounds, for it imposes a "terribly unfair" burden on the "States that are more nuclear dependent." Hearings Before the House Committee on Ways and Means on the Comprehensive National Energy Policy Act, 102d Cong., 2d Sess. 79 (Apr. 28, 1992) (Serial 102-94). The holding of the court of appeals that the "direct tax" clauses do not proscribe a federal tax imposed on a "particular kind" of property" would thus squarely defeat the central objectives of these constitutional provisions. See Pet. 26.

2. The primary defense that the government now offers for the decision below is a theory that the court itself declined to adopt. The government's new theory is that the EPACT tax is not imposed on the "ownership" of property but is instead a retroactive excise tax imposed on "the prior receipt of benefits" from government-enriched uranium. Br. In Opp. 9. That new contention is contradicted by the text and structure of the statute and also by the decision of the court below.

a. In the first place, it bears emphasis that the government does not even attempt to defend the reasoning of the court of appeals on this issue. The court of appeals had suggested that the EPACT tax should be regarded as an excise tax that falls on "the purchase of * * * enriched uranium – as opposed to the ownership" of that property. Pet. App. 21a. The court's description of the tax, however, is plainly not correct.

While the statute initially purports to impose the tax on any party who "purchased" these materials from the government before October 24, 1992, it then further provides that a utility "shall not be considered to have purchased" the enriched uranium if it was "sold [by that utility] to another" utility prior to the assessment date of October 24, 1992. 42 U.S.C. 2297g-1(c), 2297g-1(c)(1), (2). By its plain terms, the tax thus does not apply to the purchase of enriched uranium;

instead, it is imposed on the utility that *owns* the uranium on the assessment date of October 24, 1992. Pet. 5-6 & n.5. As we explain in the petition, the obvious character of any direct tax that "falls upon the owner merely because he is the owner" (*Bromley* v. *McCaughn*, 280 U.S. at 138) is that it is assessed on individuals who (at some earlier time) acquired the property and who (as of the assessment date) still own it. Pet. 24. Nothing in the government's brief disputes that plain fact.[3]

b. The government instead claims that the EPACT tax should be regarded as a retroactive excise imposed on the "prior receipt of benefits" (Br. In Opp. 9) from the government-enriched uranium. That contention is incorrect and in conflict with the submissions of the United States in the prior constitutional litigation involving this same tax.

(i) The "benefits" that the utilities received from the enriched uranium that they purchased were paid for under the fixed price contracts between the utilities and the government. See Pet. 4. These utilities received no additional "benefits" from the fact that the government performed its uranium enrichment procedures in careless or inappropriate ways that resulted in needless and severe pollution. The government has therefore acknowledged – indeed, insisted – in prior litigation involving this tax that the EPACT assessment is *not* a retroactive fee for services provided but is instead a "general tax." And, in that prior litigation, the Federal Circuit

---

[3] The government also makes no effort to defend the alternative reasoning of the court of appeals that the challenged tax should be treated as an "excise" simply because it is imposed on a "consumable" (Pet. App. 20a). The government does not dispute that, for the reasons detailed in the petition, this alternative holding of the court of appeals is both incorrect and in conflict with the decisions of this Court and other courts of appeals. See Pet. 22-23.

has upheld the government's claim that the EPACT assessment is a "general exercise of Congress's taxing power * * * rather than an act that retroactively increases the price charged to contracting parties." *Yankee Atomic Electric Co.* v. *United States*, 112 F.3d 1569, 1577 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998).

The government is necessarily bound by its affirmative representations in its prior successful litigation and may not now conveniently alter its theory to claim that the "general tax" imposed by the EPACT should instead be regarded as a "retroactive fee" or "excise" imposed on "the prior receipt of benefits" by the affected utilities. Presumably in recognition of the binding nature of the government's prior submissions in the related constitutional cases (see Pet. 7-8), the court below declined to adopt or even address the new and inconsistent theory advanced by the government in this case.

(ii) It is clear, in any event, that the EPACT assessment is *not* a fee or excise tax based on "the prior receipt of benefits." This tax does not apply *as* the enriched uranium is used and does not apply only to uranium that *is* used. The tax simply has nothing to do with whether or when the utility receives "benefits" from the uranium. Instead, the clear text of the statute specifies that the tax is imposed on the utility that had purchased the uranium, and not resold it to another utility, by the assessment date of October 24, 1992. See Pet. 5-6 & n.5. The utility that had purchased the uranium and not resold it by the assessment date is the utility that owned the uranium *on* the assessment date. The tax is thus squarely imposed on the "ownership" of this property, not on the "receipt of benefits" from it.[4] Indeed, the court of appeals ultimately

---

[4] The *amount* of the tax imposed on each utility is also calculated by the amount of enriched uranium that the utility had purchased and not resold – regardless whether the utility had used

accepted this simple truth by acknowledging that "the tax [at issue in this case is] *on the ownership* of government-enriched uranium purchased directly or indirectly from the government." Pet. App. 24a (emphasis added).

c. The government also errs in attempting to ascribe some constitutional significance to the fact that the EPACT assessment applies only to the ownership of government-enriched uranium and not to enriched uranium obtained from "different suppliers" (Br. In Opp. 11). A federal property tax that is imposed on government bonds, and not on private bonds, would still be a tax imposed on "property – which Congress cannot exact without apportionment." *United States* v. *Manufacturers National Bank*, 363 U.S. at 197-198.

3. The government does not contend that the constitutional question presented in this case lacks substantial recurring importance. If, as the court below concluded, Congress is free to impose direct property taxes on the ownership of any "particular kind" or distinct type of property (such as shares of stock, or bonds, or bank accounts, or personal residences), the express limitation on direct federal taxation that the Founders placed in the Constitution would

---

or otherwise "received benefits" from that uranium prior to the assessment date. As respondent notes, it is possible that *some* of the enrichment values of the uranium may have been used prior to the assessment date, but the tax is clearly not based on the amount of (or even the existence of) such depletion. Instead, the tax falls on a utility based solely on the fact that the utility had purchased enriched uranium and not resold it as of the assessment date. As to the property thus retained by the utility on the assessment date, the tax impermissibly "falls upon the owner merely because he is owner" (*Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945)) and therefore violates the "direct tax" clauses of the Constitution. *Bromley* v. *McCaughn*, 280 U.S. at 137; *Eisner* v. *Macomber*, 252 U.S. at 205, 219.

have no meaning or effect. See Pet. 25-27. Under the government's submission, the United States would be free to impose direct property taxes that overlap and interfere with the essential, retained taxing powers of the States. This Court has plainly concluded, however, that the central purpose of the "direct tax" clauses was to prohibit the very sort of federal interference with powers of state taxation that the decision in this case permits. See *Pollock*, 158 U.S. at 621; Pet. 20.

By depriving the "direct tax" clauses of their intended role in the constitutional scheme, the decision of the court of appeals would effect a radical restructuring of the longstanding limitations on the federal tax power. Because the decision in this case broadly sanctions the imposition of unconstitutional federal property taxes, and thereby upsets fundamental limitations on the federal taxing power, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

MELVIN C. GARBOW
HOWARD N. CAYNE
JONATHAN S. MARTEL
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

KENT L. JONES
Counsel of Record
TERESA WYNN ROSEBOROUGH
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

Counsel for Petitioner

SEPTEMBER 2004